Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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ARTHUR E. GERTH,
Petitioner,

v.

SEARS, ROEBUCK & COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where the articulated reason of the employment discrimination defendant for termination was the employee's unsatisfactory job performance, is the "qualified" prong of a *prima facie* case under *McDonnell Douglas Corp. v. Green* defined by the employer's subjective view of the employee's job performance, or must the employer's subjective view of the employee's job performance be evaluated by the fact-finder at the "pre-text" stage?

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LOWER COURT OPINIONS AND ORDERS

Arthur E. Gerth respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 14, 1996, in order to resolve the conflict within and among the Circuit Courts of Appeals on the important issues presented herein. The Opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this Petition is unpublished by Order of the Sixth Circuit. It is reprinted in Appendix A hereto (App. A) at page A-1. This Opinion upheld the Judgment of the United States District Court for the Eastern District of Kentucky granting Summary Judgment for Defendant entered December 12, 1994. The District Court Opinion is reprinted in Appendix B hereto (App. B) at page B-1.

BASIS FOR JURISDICTION

I. On December 12, 1994, the United States District Court for the Eastern District of Kentucky granted summary judgment against Petitioner, Arthur E. Gerth ("Gerth"). Gerth timely appealed to the United States Court of Appeals for the Sixth Circuit. On August 14, 1996, the United States Court of Appeals for the Sixth Circuit affirmed the District Court Opinion, Order and Judgment. Pursuant to Supreme Court Rule 13, this petition has been filed within 90 days after entry of the Judgment of the United States Court of Appeals for the Sixth Circuit. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and *Public Service Com. v. Batesville Tel. Co.* (1931) 284 US 6, 76 L Ed 135, 52 S Ct 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ky. Rev. Stat. Ann. Section 344.040. Reprinted in Appendix C hereto (App. C) at page C-1.

STATEMENT OF THE CASE

Gerth filed this action against Sears, Roebuck & Company ("Sears") in the Fayette Circuit Court on July 27, 1993, alleging age discrimination under Ky. Rev. Stat. Ann. Section 344.040. Based on diversity of citizenship, Sears removed this action to the U.S. District Court. On December 12, 1994, the District Court sustained Sears' Motion for Summary Judgment deciding that Gerth had not proved a *prima facie* case of age discrimination because he had not met his burden of proof on the "qualified" prong of the *McDonnell Douglas Corp. v. Green*[1] four-prong criteria. The United States Court of Appeals for the Sixth Circuit affirmed.

From 1960 until his termination in April 1993, Gerth worked for Sears as a salesperson. Throughout his employment Gerth consistently received marks of "meets expectations" or better on all evaluations.

Gerth's performance in the appliance department as a salesperson was excellent: in 1990 he ranked second in the department and in the entire store in gross sales; in 1992 he ranked first in both categories; and in the first three (3) months of 1993 he ranked second in both categories. In April 1993 Gerth's employment with Sears was terminated.

Sears' stated reason for terminating Gerth's employment was that Gerth failed to meet maintenance agreement sales goals. Sears' internal evaluations show that maintenance agreement sales were only a part of a salesperson's evaluations and were not the sole basis for evaluating the performance. Gerth's evaluation of 1991 evaluated Gerth at "below expectation" with respect to maintenance agreement sales goals but rated Gerth overall as "meets expectations."

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[1] 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817 (1973)

In 1991 Gerth's total maintenance agreement sales were second best in the appliance department and fourth best throughout the store. In 1992 Gerth's total maintenance agreement sales were second best in the appliance department and third best for the entire store.

In 1992, 43 salespersons of the total 50 salespersons at the Sears store failed to meet their goals, and 12 ranked below Gerth for that year. Through the first three months of 1993, 32 salespersons of the 49 total salespersons at Sears failed to meet the maintenance agreement sales goals, and five of these individuals ranked below Gerth.

Gerth was 51 years old when terminated in April 1993. When Gerth was terminated five (5) other salespersons had lower maintenance agreement sales percentages than Gerth. Those five (5) employees were all in their 20s or 30s but received no adverse job action.

Gerth's replacement was 35 years of age. She ranked below Gerth both in gross merchandise sales and gross maintenance agreement sales. Gerth's replacement also failed to meet her maintenance agreement sales goals.

Gerth produced proof that Sears employees were pressured and coerced into accepting early retirement, thus establishing a pattern of removing older, well-paid employees. Long-time employees who did not take early retirement were demoted with lower pay and job position and/or threatened with loss of future employment.

REASONS FOR GRANTING THE WRIT

There is a conflict among the Circuits as to whether the employee's job performance is to be evaluated as a part of the "qualified" prong of a *McDonnell Douglas prima facie* case, or evaluated by the fact-finder at the *McDonnell Douglas* "pretext" stage. *McDonnell Douglas Corp. v. Green* recognized that the

allocation of proof in an action challenging employment discrimination was a critical issue and held that a claimant, upon establishing a *prima facie* case, followed by the employer articulating a legitimate non-discriminatory reason for the employment action, shall then "be afforded a fair opportunity to show that Petitioner's stated reason for a Respondent's rejection was in fact pretext." *McDonnell Douglas*, at 804. This Court further held that especially relevant to such showing of pretext would be evidence that other employees not in the protected class were not treated the same as the employee. (*Id.* at 805). This Court stated further in *St. Mary's Honor Center v. Hicks*, 509 US___, 125 L Ed 2d 407, 113 S Ct 2742 (1993), that from the establishment of the *prima facie* case through the employer's production of evidence of non-discriminatory reasons, there is no issue of credibility of proof. (*Id.* at 417). The credibility-assessment stage begins when the employee has the full and fair opportunity to demonstrate through his evidence that the proffered reason given by the employer was not the true reason for the employment decision. This Court in *St. Mary's* further stated at 421,

> Quite obviously, however, what is required to establish the *McDonnell prima facie* case is infinitely less than what a directed verdict demands.

The United States Courts of Appeals are in conflict in their interpretation of the foregoing.

The Sixth Circuit is divided in the interpretation of the foregoing. In the action herein, the Sixth Circuit found that Gerth had not established a *prima facie* case because he did not meet his proof of qualification. The Court discussed Gerth's performance and discussed facts of said performance and held that Gerth was not "qualified" or did not perform his job "satisfactorily." The Court made a credibility-assessment of actual job performance at the *prima facie* stage of proof. The Sixth Circuit found otherwise in *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996). In *Hartsel* the Sixth Circuit found that the employee was qualified for purposes of

the *prima facie* case but lacked computer skills in the stage of proving pretext. In *Danielson v. City of Lorain*, 938 F.2d 681 (6th Cir., 1991), the Sixth Circuit found that the employee had established a *prima facie* case and the issue of actual job performance went to the issue of the employee proving pretext for discrimination.

In addition to conflict within the Sixth Circuit, there is also conflict among the Circuits. The First, Second, and Ninth Circuits agree that the initial determination of "qualification" under *McDonnell Douglas* is distinct from the employee's actual job performance to negate an employer's legitimate reasons for termination. *See Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323 (1st Cir. 1996); *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995); and *E.E.O.C. v. Insurance Co. of North America*, 49 F.3d 1418 (9th Cir. 1995). In *Sutera* the Second Circuit stated that Sutera was qualified because of his prior 31 years of experience despite proof by the employer of problems in actual job performance.

Likewise, the Third Circuit Court of Appeals in *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995), distinguished qualification for the establishment of the *prima facie* case from actual job performance to be used for establishing pretext. *Brewer* was qualified because of his prior 23 years as a sales representative.

The Fourth Circuit conflicts with the First, Second and Ninth Circuits and some Opinions of the Sixth Circuit. *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995), required the employee to establish satisfactory job performance at the *prima facie* "qualified" stage.

The Fifth Circuit interchanges the requirement of being qualified with job performance. *Miller v. Butcher Distributors*, 89 F.3d 265 (5th Cir. 1996), concluded that, in so far as proof is concerned, whether Miller was qualified for the job and whether Miller performed his job satisfactorily were synonymous.

The Seventh Circuit uses the terms and issues of qualifications and performance interchangeably. In *Wohl v. Spectrum MFG., Inc.*, 94 F.3d 353 (7th Cir. 1996), the Court considered whether or not plaintiff had established a *prima facie* case. The Court discussed whether or not plaintiff was qualified and whether or not Plaintiff had good job performance, as the same issue. The Court further stated that proof on the issue of job performance was that

> this is essentially a swearing contest. Summary Judgment is not the appropriate place to resolve this genuine dispute over a material fact.

Id. at 358. Thus, although the Court interchanged the issue of qualification and the issue of job performance, the Court recognized that as to the issue of job performance, such becomes an issue of fact not appropriate for summary judgment.

The Eighth Circuit has held that job performance is a fact question separate from the *prima facie* requirement that the employee be qualified for the job position. In *Neufeld v. Searle Laboratories*, 884 F.2d 335 (8th Cir. 1989), the jury answered a special interrogatory that asked whether the jury believed that plaintiff was performing his job in a manner satisfactorily to defendant and the jury stated "no." The other special interrogatory asked the jury if they believed that the unsatisfactory performance was the only reason the employee was discharged and the jury stated "no." The Court held that Neufeld had established a *prima facie* case, and the jury could have reasonably found that the reason given for the termination by Searle Labs, poor job performance, was a pretext and not the real reason for termination of Neufeld. The Court stated in *Neufeld*

> This is so because the law protects all older employees, including those of average and below average ability, from being treated more harshly than they would have been if they were young.

Id. at 339. Thus the Eighth Circuit holds that qualification as part of plaintiff's *prima facie* case is completely separate from the fact-intensive issue as to actual job performance to show pretext.

The Eighth Circuit in *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), held that the *McDonnell Douglas* "pretext" stage, where the issue of job performance becomes relevant, is more "fact sensitive." *Id.* at 1334. *Rothmeier* discusses that the *McDonnell Douglas* framework was a recognition by the Supreme Court that there would seldom be direct evidence of discrimination, and that courts should not make it more difficult for a Plaintiff alleging employment discrimination to withstand summary judgment.

The Tenth Circuit holds that qualification required for the Plaintiff to establish a *prima facie* case is separate from performance or pretext stage. *See Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995), and *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324 (10th Cir. 1996). The Tenth Circuit in *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), held that selective enforcement of rules by an employer goes to the issue of performance as proof of pretext and not as to establishment of a *prima facie* case.

The Eleventh Circuit separates qualification from actual job performance. In *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497 (11th Cir. 1991), the Court held that Alphin had presented sufficient evidence to establish a *prima facie* showing of age discrimination, despite Sears' disciplining Alphin for performance. The Court held that competence in his work, although relevant, was only a small part of the inquiry. The real issue was whether Alphin could demonstrate an actual intent on the part of Sears to discriminate on the basis of age. The Court held that since Alphin had established his *prima facie* case, and had evidence which conflicted on issues of material fact, that

> a jury should resolve the underlying factual disputes in this matter, in order to determine whether Sears'

> perception of Alphin's conduct or discriminatory intent, motivated his discharge.

Id. at 1502. Thus, once an employee establishes a *prima facie* case and conflicting evidence on the issue of pretext the matter becomes a jury issue to resolve the underlying factual disputes.

The interpretation of *McDonnell Douglas* and *St. Mary's* by the Sixth Circuit in the action herein and the Eleventh Circuit in *Alphin* produced the opposite result on virtually identical facts. The other Circuits are in conflict concerning how to consistently interpret and apply *McDonnell Douglas* and *St. Mary's*. The conflict is clear and irreconcilable resulting in Plaintiffs being held to different standards depending on the Circuit and attorneys being unsure in employment discrimination cases as to what standard will be imposed for summary judgment. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner Gerth requests that this Court grant Certiorari in the matter herein.

Respectfully Submitted,

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****

APPENDIX A

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Eastern District of Kentucky
FILED
DEC 12 1994
At Ashland
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

CIVIL ACTION NO. 93-345

ARTHUR E. GERTH, PLAINTIFF,

V.

SEARS, ROEBUCK & COMPANY, DEFENDANT.

JUDGMENT

In accord with the Court's Memorandum Opinion and Order filed on this date, and being sufficiently advised,

IT IS ORDERED AND ADJUDGED:

1) that the defendant's motion for summary judgment [Record No. 29], is hereby **SUSTAINED,**

2) that the plaintiff's complaint is **DISMISSED** with prejudice and the plaintiff shall take nothing thereby,

3) that the matter is **STRICKEN** from the Court's docket, and

4) that this is a final and appealable order.

This 12th day of December, 1994.

/s/_____
HENRY R. WILHOIT, JR., JUDGE

Eastern District of Kentucky
FILED
DEC 12 1994
At Ashland
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 93-345

ARTHUR E. GERTH PLAINTIFF,

V.

SEARS, ROEBUCK & COMPANY DEFENDANT.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon motion by defendant, Sears, Roebuck & Company, for summary judgment, [Record No. 29], and their motion to strike the supplemental memorandum and exhibits contained therein of the plaintiff filed on October 21, 1994. [Record No. 48]. The matter has been extensively briefed, as the Court granted the parties the opportunity to supplement the record after the first pre-trial conference held on October 7, 1994. The Court having reviewed all the material contained within the record, the matter is now ripe for determination.

I.

Factual Background

The plaintiff, Art Gerth, is a former employee of defendant, Sears, Roebuck & Company ("Sears"). For thirty-three (33) years, he occupied various positions with the defendant ranging from

salesman to manager. From 1971 to 1990, he was the Auto Center manager at the Fayette Mall location, earning approximately $49,000/year. In 1989, the auto center ranked first out of a thirteen store region for gross profit dollars and merchandise sales. However, as the pressure increased for him to meet certain sales goals for maintenance agreements,[1] extended warranties, and other paper products, he felt his job might be in jeopardy. Ultimately, he requested a transfer to the Home Appliance section, where at age 48, he became a salesperson.

In the appliance section, Gerth was one of the top gross sellers of merchandise, but continued to have problems selling the maintenance agreements. In the Appliance Department, he ranked second in his department and in the entire store in 1991 for gross sales, first in both the store and his department for 1992, and second in his department and the entire store through the first three months of 1993. Clearly, it was not his gross sales of merchandise, but the sale of maintenance agreements as a percentage of gross sales (the "MA percentage") that concerned management.

Mr. Gerth was well aware of the importance placed upon an employee's MA percentage by management. While working in the appliance department, he noted that daily, weekly or monthly meetings were held between management and sales associates to discuss Sears' goals for the performance levels of its sales staff. Unfortunately, Mr. Gerth repeatedly failed to meet the MA percentage established for him. On several different occasions, he was called in for "deficiency interviews" and told to increase his monthly sales of maintenance agreements.

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[1] Many products sold by Sears are serviced by Sears' repairmen. A maintenance agreement which provides for no-cost service and preventive maintenance for a certain period of time is offered when a product is sold.

In October of 1992, he was given a written warning stating that unless his numbers increased dramatically, continued employment in the appliance department would not be possible. Mr. Gerth received his annual evaluation on February 11, 1993. His performance was satisfactory or above average in most categories, but his MA percentage was still far below expectations. On March 1, 1993, another review was issued. Again, he was told to improve his sales of paper products or face possible transfer. At the end of March in 1993, Mr. Gerth was told he had failed to meet the MA percentage once again and that he could not continue to work in the appliance department. Several other positions with the company were discussed. Faced with the possibility of a drastic cut in salary, Mr. Gerth requested and received severance benefits for ten weeks.

As a result of his inability to meet the quotas established by management, his employment relationship with Sears ended when he was fifty-one (51) years old. Soon thereafter, this action was filed in Fayette Circuit Court alleging age discrimination and wrongful discharge. Sears removed the matter to Federal Court.

The plaintiff was replaced by a younger employee, Susan Adams, age thirty-five (35), whom Gerth claims was less-qualified than he, ranking below him in gross merchandise sales and gross maintenance agreement sales. Ms. Adams also had failed to meet her MA percentage goal on several occasions.

II.

The Age Discrimination Claim

The plaintiff bases his age discrimination claim upon four circumstances: (1) two employees, Mr. Melangton and Mr. Baylous, in their late 50's were "pressured" into accepting early retirement[2], (2) the existence of an early retirement program

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[2] This retirement package was offered nationwide by Sears to over 4,000 management level employees.

offered by Sears to management level employees serving as an indication of the bias or hostility against persons over the age of forty, (3) Gerth was replaced by a thirty-five (35) year old person that had previously worked part-time and had fewer gross sales of maintenance agreements[3], and (4) younger employees, also struggling to meet the MA percentage set by management, were allowed to remain in their positions and faced no adverse employment action.[4]

A.

Legal Standards

There is a three step analysis used by the courts in discrimination suits: (i) the plaintiff bears the burden of producing sufficient evidence to establish a *prima facie* case of discrimination, (ii) If this burden is met, the defendant must then articulate a legitimate, non-discriminatory reason for its actions[5], and (iii) once a reason is articulated, the "ball is back in the plaintiff's court" to show that this reason was merely a "pretext" for the discrimination. See Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Wilson v. Stroh Companies, Inc., 952 F.2d 942, 945 (6th Cir. 1992).

---

[3] However, the plaintiff did admit in his deposition that Ms. Adams had a better MA percentage. Sears did not focus on employee's total gross sales of merchandise.

[4] Plaintiff also admitted that only one such employee worked in the appliance department and that he was a part-time employee.

[5] Remember, the burden of proof remains on the plaintiff at all times and never shifts to the defendant. The defendant's burden is merely one of persuasion. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).

In Kentucky, the courts apply the same three step analysis to resolve a cause of action under the Kentucky Civil Rights Act. Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226 (1984). Under these statutes, a plaintiff must not only be able to establish a *prima facie* case, but also must prove "cold, hard facts" or specific evidence to show the non-discriminatory reasons asserted by the defendant for the discharge were merely pretextual. Id. at 230.

1. *The Prima Facie Case*

In age discrimination suits, there are two ways for the plaintiff to establish a *prima facie case* to create the presumption of discrimination by the defendant employer: (1) the McDonnell Douglas traditional approach using a four prong test, or (2) direct, circumstantial or statistical evidence of discriminatory intent. McDonald v. Union Camp Corp., 898 F.2d 1155, 1160 (6th Cir. 1990). The second test was established when the courts realized that age discrimination suits did not always fit neatly into the traditional four prong McDonnell Douglas test enunciated by the Supreme Court of the United States. McDonnell Douglas v. Green, 411 U.S. 792,802 (1973). The Sixth Circuit was opposed to a mechanical application of the McDonnell Douglas test to age discrimination claims. Inherently, younger workers are hired when older employees are terminated; age discrimination is not always a factor. If a plaintiff cannot prove a *prima facie* case of age discrimination, his claim will fail as a matter of law. Id.

In this instance, the plaintiff cannot prove the *prima facie* elements of age discrimination using the McDonnell Douglas test. To establish a prima facie [sic] case of age discrimination, Mr. Gerth must prove he (i) was over 40; (ii) was subjected to adverse employment action; (iii) was qualified for the position at issue, and (iv) was replaced by a person outside the protected class. McDonald, 898 F.2d at 1160.

The proof of **qualification** is an essential element, and record reveals that the plaintiff admitted he had not met his

employer's sales goals. The plaintiff must show that he was meeting the level of his employer's legitimate expectations, and Gerth admitted in his depostion [sic] that he was not meeting the MA percentage set for him by Sears. McDonald, 898 F.2d at 1160. A motion for summary judgment is not defeated in this instance by arguing that the employer's standards were unreasonable or excessively high. He cannot write his own job description. Palucki v.Sears, [sic] Roebuck & Co., 879 F.2d 1568, 1571 (7th Cir. 1989); See also Harker, 679 S.W.2d at 230 (holding the age discrimination law was note [sic] intended to be a vehicle for judicial review of business decisions.)

In the McDonald case, the plaintiff did not dispute the fact that his supervisors were dissatisfied with his work. Instead, he argued that they made "too big of a deal" out of his people problems. Since the plaintiff conceded that the employer was not satisfied with his performance, there was not genuine issue as to if he was qualified for the position. The Sixth Circuit held that he had failed to establish a *prima facie* case of age discrimination. McDonald, 898 F.2d at 1160.

Likewise, the Kentucky Supreme Court has held that a plaintiff cannot avoid summary judgment after admitting facts which establish a legitimate basis for discharge or demotion. A material issue of fact cannot be made by questioning an employer's business judgment. Harker, 679 S.W.2d at 230. The same rationale should apply in the case at hand. Like above, Mr. Gerth has admitted that his job performance failed to meet his supervisors' expectations. He cannot prove he was qualified by arguing that these expectations were too great.

However, there is another means available to the plaintiff to establish his *prima facie* case. The Sixth Circuit determined in McDonald that the McDonnell-Douglas four part test was not the "only" way of establishing a *prima facie* case. McDonald, 898 F.2d at 1161. If the plaintiff admits during discovery that he was not qualified for the job, he may introduce evidence that he was adversely affected by the defendant's employment decision under

circumstances which give rise to an inference of unlawful discrimination. Id. at 1161.

The plaintiff cites as persuasive authority an Eleventh Circuit case discussing adequate circumstantial evidence to create this inference. In Alphin v. Sears, Roebuck & Co., 940 F.2d 1497 (11th Cir. 1991), the trial court granted summary judgment on the basis that (1) Alphin had been discharged for poor performance, (2) he had not established a *prima facie* case of age discrimination, (3) Sears had articulated a non-discriminatory purpose and (4) that the plaintiff had failed to show pretext. The Eleventh Circuit reversed and held that while he might not win at trial, he had, at least, established a *prima facie* case of age discrimination. The circumstantial evidence presented included a history of favorable job evaluations, evidence that he had been disciplined for shortcomings which were ignored in others, and comments on the quality of work from other employees. Id. at 1501-02. Mr. Gerth argues that this matter should also go to the jury in order to determine Sears' true motivation in the discharge.

Gerth argues he has shown that other employees not in the protected class, but similarly situated, failed to meet their MA percentage goal and suffered no adverse employment action. He submitted Exhibit 35 along with his response to the motion for summary judgment. This is Gerth's attempt to use statistical data to show disparate treatment of Sears employees failing to meet the MA percentage goal. Through the first three months of 1993, five other employees were listed with worse MA percentage performance levels. The plaintiff, 51, was terminated, while the other five, in their twenties and thirties, suffered no action.

Additionally offered by Gerth to bolster the circumstantial evidence of discriminatory intent, he provided affidavits from two former employees, Peggy Flora, and Richard Wakefield, who state they felt constant "pressure" to take the buy-out offered by Sears. Armed with Exhibit 35, his history of satisfactory performance evaluations and these affidavits, Mr. Gerth feels he has made an adequate showing of evidence that gives rise to the inference of

discrimination. However, the Court is not persuaded by this evidence.

Plaintiff's Exhibit 35 compares his percentage to five younger employees. These five employees were not **similarly situated**; that is, these five were part-time employees and all but one of them worked in a different department. According to the Sixth Circuit, the comparables must be "similarly situated in all respects". Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992). Furthermore, in an unpublished decision, Asher v. Riser Foods, Inc., No. 92-3357, 1993 U.S. App. LEXIS 7576 (6th Cir. 1993), the Sixth Circuit has held that part time is not the same as full time even if the employee holds the same title and performs the same type of work. Similar work records and experience is another prerequisite to comparables. Shah v. General Electric Co., 816 F.2d 264 (6th Cir. 1987).

In the affidavit of Larry Blackburn, the current Brand Central Sales Manager, he discusses these critical distinctions. The sales associate in the home appliance department has the opportunity to sell a maintenance agreement to nearly every product purchased at Sears while an associate in another department might not have that chance. For instance, an associate in the hardware department or women's clothing department could never sell as many maintenance agreements as one in the home appliance or auto center.

Likewise, part-time employees are not as likely to sell as many maintenance agreements. The plaintiff has provided the affidavit of one of his past supervisors, Edward Baylous, stating that, **in his opinion,** it is appropriate to compare full-time and part-time employees. However, a supervisor's conclusory affidavit that offers his personal opinion does not create an issue of material fact. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124-25 (7th Cir. 1994) While the plaintiff argues that the method of calculating the MA percentages is the same for all employees, the Court finds that assertion immaterial. If the employees errors or misconduct has a substantially different impact on the employer,

then they are not similarly situated. See Reynolds v. Hurnko Products, 756 F.2d 469 (6th Cir. 1985) (race discrimination suit holding misconduct of black employees, drinking while on duty, was less egregious than plaintiff's conduct and not suitable as comparison data). It is completely reasonable for an employer to be more concerned about the performance deficiencies of a full time employee rather than a part time; clearly, this is a decision for Sears' management team. Questioning an employer's business judgment does not raise an issue of material fact. Essentially, Exhibit 35 does infer to the Court that Sears treated older employees disparately. Gerth has not used as "comparables" employees that were similarly situated.

The plaintiff's attempts to persuade the Court that he "believed" he was subjected to increased pressure because of his age are not valid. Again, the Sixth Circuit and the Kentucky Supreme Court has discounted personal opinions, speculation, conjecture, or beliefs as raising issues of material fact precluding summary judgment or support an inference of age discrimination. See Chappell v. GTE Products Corp., 803 F.2d 261, 268 (6th Cir. 1986), cert. denied, 480 U.S. 1010 (1987); Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 229-31 (1984).

The mere existence of an early retirement incentive plan does not give rise to an inference of age discrimination either. Wilson v. Firestone Tire and Rubber co., 932 F.2d 510, 514 (6th Cir. 1991). The fact that several co-workers chose to take early-retirement proves nothing. See Simpson v. Midland-Ross Corp., 823 F.2d 937 (6th Cir. 1987)(early retirement is not an example of age discrimination). The plaintiff attempted to embellish his story with affidavits from two other employee [sic] whom allegedly accepted the early retirement option after being pressured into doing so by Sears.

These affidavits merely state personal opinions and do not provide any factual basis for their fears other than they were replaced by younger employees. The Sixth Circuit has rejected evidence of another employee's acceptance of early retirement

where nothing was offered to prove the employee was forced to retire. Simpson v. Midland-Ross Corp., 823 F.2d 937, 944 (6th Cir. 1987) The circumstances found in the record are not enough for this Court to conclude that Sears discharged or terminated Mr. Gerth with discriminatory intent.

2. *Legitimate, Non-discriminatory Basis for Discharge and Pretext*

Even if the Court assumes that a *prima facie* case has been established, the defendant has undoubtedly provided a legitimate reason for discharge: the failure to meet the MA percentage goal established for him. Thus, the plaintiff must show that the articulated reasons are merely pretextual. While the plaintiff argues that the defendant cannot meet this burden because other employees similarly situated did not receive adverse treatment, the defects in this rationale have already been discussed. There is no reason for this Court to reach the issue of a pretextual basis for discrimination.

3. *Pretext for discrimination.*

Nonetheless, when determining **pretext**, the fact-finder cannot focus on the soundness of the employer's business judgment. Wilkins v. Eaton Corp., 790 F.2d 515, 521 (6th Cir. 1986). Instead, the Court looks into the employer's true motivation and intent. Wrenn v. Gould, 808 F.2d 493, 502 (6th Cir. 1987). The courts do not sit as "super personnel departments"; that is, an employer may make a subjective judgment to discharge an employee for any reason that is not discriminatory. Dale v. Chicago Tribune, 797 F.2d 458, 464 (7th Cir. 1986) cert. denied, 479 U.S. 1066(1987),quoting Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982). Consequently, a plaintiff will not raise a genuine issue of material fact merely by questioning the judgment of his supervisor. McDonald v. Union Camp Corp, 898 F.2d 1155, 1160 (6th Cir. 1990). If job performance is at issue, the plaintiff's perception of himself is of no relevance either. It is the perception of the

decision maker that is the Court's focus. Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980).

Recently, the Sixth circuit listed three methods for establishing pretext. Manzer v. Diamond Shamrock Chemical Co, 29 F.3d 1078, 1084 (6th Cir. 1994) quoting McNabola v. Chicago Transit Authority, 10 F.3d 501 (7th cir. 1993). **First**, do the proffered reasons are "factually false". Id. [sic] Having admitted that he did not sell enough "paper products" in the auto center, or enough maintenance agreements in the appliance section, there is no way he can claim that the reason given by Sears had no basis in fact. **Secondly**, the plaintiff can prove that the proffered reasons did not actually motivate his discharge. He would admit the factual basis underlying the employer's proffered explanation, but indirectly attacks the credibility of this reason by showing circumstances which tend to prove an illegal motive was more likely the reason for the discharge. He would admit the factual basis underlying the employer's proffered explanation, but indirectly attacks the credibility of this reason by showing circumstances which tend to prove an illegal motive was more likely the reason for the discharge. since this is very similar to *prima facie* elements, the Court noted that additional evidence overwhelming Sears' reasons for his discharge is required. Id. The plaintiff has not produced this type of evidence. **Thirdly**, the plaintiff could show that the reasons given were insufficient to motivate the discharge. To do this, he would have to show that similarly situated employees that performed as poorly were not disciplined. Unfortunately, Gerth has not provided the appropriate evidence as to meet the *prima facie* burden, thereby precluding a finding of this prong either. His claim for age discrimination must fail and defendant's motion for summary judgment is sustained.

III.

The Wrongful Discharge Claim.

The wrongful discharge claim is similarly lacking in plausibility. In Kentucky, an at-will employee can be terminated

by either party for any reason. Nork v. Getter Printing Co., Ky. App., 738 S.W.2d 824, 826-27 (1987). However, there is a public policy exception to the rule recognized by the Kentucky courts. Gryzb v. Evans, 700 S.W.2d 399 (1985). If the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law, constitutional or statutory provision, then Court can decide as a matter of law that the discharge was wrongful. Id. at 402.

The plaintiff does not identify any specific violation of law by any employee of Sears, nor identify any occasion on which he was asked to violate a law. He merely offers general allegations that Sears employees sometimes engaged in illegal selling practices. In Gryzb, the Supreme Court rejected the argument that a cause of action for wrongful discharge could be based on nothing more than general allegations of illegal or improper practice on the part of the plaintiff. Id. at 400. Whether or not other employees engaged in illegal conduct is of no relevance as the plaintiff admitted that Sears never asked him to perform an illegal act. He provided two affidavits of individuals claiming that employees were pressured to meet sales quotas and that many responded with "illegal or improper" sales tactics. However, the plaintiff has admitted in his deposition that Sears terminated any employee that acted illegally, or was caught playing games. Gerth admits that he was never asked to perform an unlawful act and that he has no evidence linking his alleged discharge in 1993 to anything that occurred while he was Auto Center manager. These affidavits cannot alter these admissions.

Gerth does cite at least one occasion where he was told to sell maintenance agreements to commercial customers. Gerth thought this violated an internal Sears policy. Unfortunately, internal policy is not the law, and there is no statute that prohibits retailers from doing this. He also admitted that while he believed that selling maintenance agreements to commercial accounts was contrary to internal policy, he has no evidence that his refusal to do so resulted in an adverse employment action. The wrongful

discharge claim is meritless and the defendant's motion for summary judgment is sustained to this claim as well.

IV.

Conclusion

The plaintiff has failed to establish a *prima facie* case of age discrimination. It is truly unfortunate for Mr. Gerth and the Court is extremely sympathetic to his plight. However, sufficient evidence has not been presented in the record for the Court to conclude that Sears engaged in disparate treatment of Mr. Gerth because of his age. Even if the Court assumes that plaintiff met his initial burden, Sears clearly articulated a non-discriminatory legitimate business decision. This Court will not review, nor alter, this decision. Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

1) that the defendant's motion for summary judgment, [Record No. 29] is hereby **SUSTAINED;** and

2) that the defendant's motion to strike the plaintiff's supplemental memorandum and exhibits, [Record No. 48] is hereby **OVERRULED.**

This is the 12th day of December, 1994.

/s/_____
HENRY R. WILHOIT, JR., JUDGE

****

APPENDIX B

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FILED
AUG 14 1996
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 94-6664

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR E. GERTH,	)
PLAINTIFF-APPELLANT,	)
V.	)
SEARS, ROEBUCK & CO.,	)
DEFENDANT-APPELLEE.	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY

BEFORE: **SUHRHEINRICH** and **SILER,** Circuit Judges; **EDMUNDS,** District Judge.[1]

SILER, Circuit Judge. Plaintiff, Arthur E. Gerth, appeals the district court's grant of summary judgment to Defendant, Sears, Roebuck & Company ("Sears"). Gerth filed an age discrimination lawsuit against Sears. Gerth charges that the district court's twin legal findings, that he had not established a prima

---

[1] The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

facie case of age discrimination and that he had not established pretext after Sears articulated a legitimate reason for the discharge, were in error. For reasons stated hereafter, this court AFFIRMS the district court.

I.

Gerth began his work association with Sears in 1960. He worked his way up in the company and attained the status of auto center manager at a Lexington, Kentucky Sears store between 1971 to 1990. Gerth transferred to the appliance department in 1990.[2] While Gerth's gross sales in this department were excellent, Sears complained that Gerth was not selling enough maintenance agreements.[3] Gerth repeatedly failed to meet the maintenance agreement percentage goals established for him. Consequently, Sears offered Gerth a position in a less profitable department. Gerth refused, and he ended his employment with Sears in April 1993.

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[2] Gerth alleges that he sought this new position because he was pressured to sell more "paper product" [sic] (i.e., discount packages for automotive services), and he was unable to meet Sears' goals for these kinds of sales

[3] Maintenance agreements were high-profit, long-term warranties that were added to the sales price of appliances. It was Gerth's failure to maintain the appropriate percentage of maintenance agreements to his gross sales that concerned Sears' management. Sears cited no other complaints against Gerth except that he did not meet his maintenance agreement percentage. Apparently, this policy of requiring certain maintenance agreement percentages was followed in a number of Sears' stores. *See Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1517-18 (11th Cir. 1990) (explaining that plaintiff lost her job at Sears because she could not regularly attain her maintenance agreement percentage).

Gerth filed a Kentucky age discrimination claim, Ky. Rev. Stat. Ann. 344.040, in Fayette Circuit Court on July 27, 1993. Sears removed the action to federal district court based on diversity of citizenship and moved for summary judgment on August 24, 1994. The district court sustained this motion, finding that Gerth had not established a prima facie case of age discrimination because he did not meet his proof of qualification. Alternatively, the court found that even had a prima facie case been established, Sears had articulated a legitimate reason for the discharge and Gerth, in response, had not proven pretext for the discharge.

II.

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). On a summary judgment motion, the record and all inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

III.

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973), the Supreme Court constructed a three-part framework for handling employment discrimination cases: first, the plaintiff must establish a prima facie case of discrimination; once established, the defendant must articulate a legitimate, nondiscriminatory business reason for its actions; once articulated, the plaintiff must show that the business reason served as a pretext to mask an illegal discriminatory motive. *See McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1159-60 (6th Cir. 1990) (noting that the *McDonnell Douglas* test has been "routinely employed in this circuit"); *Harker v. Federal Land Bank of Louisville,* 679 S.W.2d 226, 229 (Ky. 1984) (noting that the Kentucky age discrimination statute is modeled after its federal equivalent and that Kentucky courts will consider federal interpretation).

A. The Prima Facie Case -- Traditional Analysis

Gerth carries the initial burden of proving "beyond a preponderance of the evidence" that he can meet the four elements of a prima facie case of age discrimination: (1) that he belongs to a statutorily protected age group, (2) that he was qualified or performed his job satisfactorily, (3) that he was nonetheless terminated, and (4) that he was replaced by a younger person. *Harker,* 679 S.W.2d at 230; *see also McDonald,* 898 F.2d at 1159-60 (applying similar standard). There is no dispute that Gerth, being over forty years old, is a member of the protected class. It is also certain that Gerth's 1993 resignation was an adverse employment action.[4] Sears replaced Gerth with a younger person, thereby meeting the fourth requirement. At issue in the case at bar is the second prong: whether Gerth performed his job in a satisfactory manner.

"In order to show that he was qualified, [the plaintiff] must prove that he was performing his job 'at a level which met his employer's legitimate expectations.'" *McDonald,* 898 F.2d at 1160 (quoting *Huhn v. Koehring,* 718 F.2d 239, 243 (7th Cir. 1983)). In other words, if Gerth "was not doing what [Sears] wanted him to do, he was not doing his job." *Id.* (quotation omitted). In this case, Sears established a maintenance agreement percentage that Gerth was required to maintain. Gerth's failure to meet this percentage was the subject of several meetings and deficiency reviews. Gerth concedes that he was not performing to the satisfaction of the Sears' management. "Consequently, [he] has failed to prove a prima facie case of age discrimination, and therefore, summary judgment under the *McDonnell Douglas* approach is appropriate." *McDonald,* 898 F.2d at 1160.

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[4] While Gerth made the ultimate decision to resign rather than transfer, because Sears subjected him to this decision, his resignation was akin to termination. *See McDonald,* 898 F.2d at 1158 (finding that plaintiff, who refused two other positions within company that "were considered demotions," was "terminated").

Gerth advances several arguments to overcome the qualification threshold. First, he claims that his gross merchandise sales and gross maintenance agreement sales belie any claim that he was not qualified for the position of appliance salesman. In other words, Gerth claims that Sears made "too big a deal" of his failure to attain the maintenance agreement percentage and should have looked at his gross sales instead. "However, the aim [of an age discrimination analysis] is not to review bad business decisions, or question the soundness of an employer's judgment." *McDonald,* 898 F.2d at 1160 (citing *Wilkins v. Eaton Corp.,* 790 F.2d 515, 521 (6th Cir. 1986)); *see Harkins,* 679 S.W.2d at 231 ("The age discrimination law was not intended as a vehicle for judicial review of business decisions regarding terminations."); *see also Baker v. Sears Roebuck & Co.,* 903 F.2d 1515, 1520 (11th Cir. 1990) (rejecting argument that gross sales should excuse a poor maintenance agreement percentage). Merely because Gerth successfully executed portions of his job responsibilities for long periods of time does not excuse his failure to meet the required percentage of maintenance agreement sales.

Next, Gerth claims that his failure to meet his maintenance agreement percentage, by Sears' own standards, should not have disqualified him outright from his position. He claims that it was not Sears' policy to judge salesmen on maintenance agreement percentage alone. As evidence, Gerth cites a Sears document that suggests that "any [salesman] who affirmatively offers the Maintenance Agreement to our Customers . . . cannot be disciplined or terminated on the basis of poor Maintenance Agreement Sales." The document later confirmed that maintenance agreement sales is but one "measure of performance" for a salesman. This document would tend to show that the mere failure to meet the established percentage, in and of itself, should not have endangered Gerth's qualifications for the job.

Sears responds that the document in question is dated June 1994, over a year after Gerth left Sears. The document itself describes that the procedure is a "new" policy on poor maintenance agreement sales performance. Gerth's brief to the district court

recognized this policy as "new," inferring that the policy was not in existence while he worked at Sears. Gerth was aware that his maintenance agreement percentage was an important performance measurement to Sears' management. Without more, the document cited by Gerth demonstrates that the business judgment of Sears' management with regard to maintenance agreement sales was "reformed." While such a change in policy would have worked in Gerth's favor had he remained with Sears, there is no evidence that the Sears' management was so enlightened at the time of Gerth's employment.

While it appears vacuous to suggest that Gerth, who quite ably sold appliances and maintenance agreements, was not "qualified" or did not perform his job "satisfactorily," he cannot establish a prima facie case by means of the *McDonnell Douglas* test. In a case remarkably similar to the one at bar, the Eleventh Circuit established that a plaintiff who could not maintain her maintenance agreement percentage and was fired despite excellent overall sales had "failed to demonstrate her prima facie case by means of the *McDonnell Douglas* test" because she was not qualified for the position. *Baker,* 903 F.2d at 1521; *see also McDonald,* 898 F.2d at 1160 (refusing to consider argument by nine-year manager that the compnay made "too big a deal out of his alleged 'people problems'" and holding that because employee conceded that he "was simply not performing to [his employer's] satisfaction, . . . there remains no genuine issue of material fact as to whether he was qualified"); *Ang v. Procter & Gamble Co.,* 932 F.2d 540, 549 (6th Cir. 1991) (noting that employee who had trouble communicating, was late with assignments, and was a poor long-range planner "was not qualified" even though he had worked in that position for a considerable period of time). The employer, and not the courts, determines the qualifications required for employment. By failing to maintain his maintenance agreement percentage, Gerth could not meet this required element to establish a prima facie case of age discrimination.

B. The Prima Facie Case -- Alternative Analysis

This circuit and the Kentucky courts have recognized an alternative for proving a prima facie case for age discrimination: plaintiffs can prove a prima facie case through direct, circumstantial or statistical evidence of discriminatory intent. "Instead of a mechanistic application of the *McDonnell Douglas* guidelines, a trial judge is to consider 'direct evidence of discrimination and circumstantial evidence other than that which is used in the *McDonnell Douglas* criteria.'" *McDonald,* 898 F.2d at 1161 (quoting *Wanger v. G.A. Gray Co.,* 872 F.2d 142, 145 (6th Cir. 1989)). Under this standard, a "plaintiff may present a prima facie case of age discrimination by introducing evidence that he was adversely affected by the defendant's employment decisions under circumstances which give rise to an inference of unlawful discrimination." *McDonald,* 898 F.2d at 1161 (quotations omitted). All that is required of Gerth is evidence indicating that age was a factor in Sears' decision to terminate his employment.

In the case at bar, Gerth admits that no direct evidence of age discrimination exists. Gerth's statistical evidence is insignificant.[5] Thus, Gerth submits that circumstantial evidence indicates that age was a factor in his termination: Sears retained younger employees who had worse maintenance agreement percentages than Gerth; Gerth had a history of favorable job evaluations and exemplary sales records; and other employees felt pressured to leave their employment with Sears because of their ages.

Gerth's foremost evidentiary proof of discrimination is that five salespersons, all of whom were younger than Gerth, were retained by Sears despite having lower maintenance agreement

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[5] Gerth compares his maintenance agreement percentage to five other employees. Such a small sampling does not provide a valid statistical analysis. *See Simpson v. Midland-Ross Corp.,* 823 F.2d 937, 943 (6th Cir. 1987) (finding that reliance upon a sample of seventeen is "suspect"); *Rowe v. Cleveland Pneumatic Co.,* 690 F.2d 88, 94-95 (6th Cir. 1982).

percentages. This "disparate treatment," according to Gerth, is indicative of Sears' age discrimination. *See Reynolds v. Humko Products,* 756 F.2d 459, 472 (6th Cir. 1985) (affirming that the standards that provided basis of termination must be applied equally). The district court agreed with Sears, however, that these other salespersons were part-time employees; thus, the court discounted the evidence because the comparison was not to others who were "similarly situated in all respects." *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 583 (6th Cir. 1992); *see Pierce v. Commonwealth Life Ins. Co.,* 40 F.3d 796, 802 (6th Cir. 1994) ("The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.") (quotation omitted). Gerth recognizes that the comparison between part-time and full-time employees is often inappropriate; however, he asserts that because Sears measured the percentage of maintenance sales to gross sales, the amount of time one sells is immaterial, thus validating the comparison.

Sears maintains that the comparisons between Gerth and the five part-time employees is invalid. It is reasonable for an employer to be more concerned about the performance deficiencies of a full-time employee than a part-timer, because the performance of a full-time employee has a substantially greater impact on the employer's operations. *Cf. Pierce,* 40 F.3d at 802 (finding that supervisor and non-supervisory personnel were different even though both engaged in sexual harassment); *Shah v. General Elec. Co.,* 816 F.2d 264, 271 (6th cir. 1987) (affirming that different standards could be applied to long-time employees as opposed to recent hirees); *Reynolds,* 756 F.2d at 472 (affirming that certain activities may cause greater concern for an employer because they are of a different magnitude); *Baker,* 903 F.2d at 1522 ("[E]mployees who have repeatedly failed to reach the quota over an extended period of many years are more likely to receive adverse employment action than employees who have experienced a similar failure for a shorter period of time."). Thus, the district court rightfully discounted the comparison.

Gerth's other proof consists of affidavits from former Sears employees that tended to show that older, well-paid employees were encouraged to take advantage of Sears' early retirement plan. Notwithstanding the propriety of this retirement plan, Gerth contends that older employees were pressured to leave their employment. Gerth suggests that such evidence, while not dispositive in and of itself, may in combination with other circumstantial evidence permit an inference that he was a victim of unlawful discrimination.

Sears contends that the district court rightly rejected Gerth's attempt to support his claim with these affidavits. This circuit has ruled that early retirement plans are not exemplary of age discrimination unless the plaintiff offers "proof that the employee was forced to retire." *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (6th Cir. 1987). While Gerth's affiants discussed the pressure and encouragement they faced to take the buy-out option, none alleged that Sears forced any employee to retire. None cited any specific facts to support any allegation that Sears discriminated on the basis of age.[6] Thus, the affiants do not provide a genuine issue of material fact that Sears had a discriminatory animus.

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[6] Gerth's affidavits do demonstrate that Sears was motivated to reduce salaries of some of its higher paid employees. While age and salary are often correlated, "an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on . . . compensation level is necessarily 'age-based.'" *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1126 (7th Cir. 1994) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993)). Gerth cannot prove age discrimination if he was fired/transferred "simply because [Sears] desired to reduce its salary costs by discharging him." *Id.* The same holds true for the early retirement plan: while Sears might have been motivated by an interest to save money, there is not specific allegation that the managers were encouraged to retire merely because they were old.

Gerth's final proof stresses his overall sales and employment record as circumstantial evidence that he was fired because of his age rather than his maintenance agreement sales percentage. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (6th Cir. 1994), is somewhat instructive to the case at bar. In *Manzer,* the plaintiff's central argument was that, despite complaints about his "combative attitude," he continued to "receive good performance evaluations and merit pay increases." 29 F.3d at 1084-85. This court did not find such arguments persuasive. *Id.* at 1085 ("Those are precisely the type of 'just cause' arguments which must not be allowed to creep into an employment discrimination lawsuit."). ***But see Alphin v. Sears, Roebuck & Co.***, 940 F.2d 1497, 1501-02 (11th Cir. 1991) (noting that competent performance may play a "small part" in producing sufficient evidence of intent to discriminate). As stated previously, just because Gerth received good evaluations in other spheres of his work responsibilities does not overcome his repeated failures to meet his maintenance agreement percentage. The circumstantial evidence submitted by Gerth, taken as a whole, is not enough to establish a prima face [sic] case of age discrimination. The district court correctly granted summary judgment.[7]

IV.

It is true that Sears terminated a salesman who, for the most part, performed well for the company. It is likely true that Sears made a poor business decision to focus on the maintenance agreement percentage as a primary measurement for satisfactory

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[7] This court is also confident that the district court ruled correctly that Gerth had not sufficiently supported his claim that the reasons proffered by Sears for his adverse employment treatment--his low maintenance agreement percentage--was pretext for illegal discrimination. In light of this court's finding that Gerth has not constructed a prima facie case, however, and analysis of Gerth's pretext claims is unnecessary.

employment.[8] It is certainly true that Sears reformed its policy regarding poor maintenance agreement sales a year after Gerth left. Nevertheless, none of these factors remotely evidences age discrimination. More is required of Gerth. While his case garners sympathy--he was the victim of poor management policy--such a dilemma is not actionable as employment discrimination.

AFFIRMED.

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[8] Sears' preoccupation with the maintenance agreement percentage shows disdain for employee and consumer. It is "counter-productive and has an 'unfair' effect upon good sales employees, such as the plaintiff. But basic unfairness does not establish discrimination, and there is not sufficient evidence in the record to establish a prima facie case of age discrimination, giving all reasonable inferences in favor of the plaintiff." *Baker*, 903 F.2d at 1523.

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APPENDIX C

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Ky. Rev. Stat. Ann. Section 344.040

344.040. Discrimination by employers.

It is unlawful practice for an employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's disability, race, color, religion, national origin, sex, age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

(2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's disability, race, color, religion, national origin, sex, or age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking; or

(3) To require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products outside the course of employment, as long as the person complies with any workplace policy concerning smoking.

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

No. 96-774

In The

Supreme Court of the United States

October Term, 1996

ARTHUR E. GERTH,

Petitioner,

vs.

SEARS, ROEBUCK & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The Petitioner is Arthur E. Gerth.

The Respondent is correctly identified in the caption as Sears, Roebuck & Company. Richard G. Griffith of Stites & Harbison is counsel of record for Respondent Sears, Roebuck & Company. Jeffrey J. Chapuran of Stites & Harbison is also counsel for Respondent Sears, Roebuck & Company.

RULE 29.6 DISCLOSURES

Pursuant to Supreme Court Rule 29.6, Sears, Roebuck & Company discloses the following nonwholly owned subsidiaries: Maxserv., Inc.; Sears Canada Inc.; and Sears, Roebuck de Mexico, S.A. de C.V.

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B. There is no conflict between the decision below and any decision of any other federal court of appeals as to the proper application of the *McDonnell Douglas prima facie* case. 9

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished by order of the Sixth Circuit and is reprinted as Appendix B to the petition. The decision of the United States District Court for the Eastern District of Kentucky, also unpublished, was entered on December 12, 1994 and is reprinted as Appendix A to the petition.

STATUTE INVOLVED

Kentucky Rev. Stat. Ann. Section 344.040 is reprinted as Appendix C to the petition.

COUNTERSTATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

As stated in the petition, this action was filed in the Fayette Circuit Court on July 27, 1993. In his Complaint, the Petitioner alleges that Sears, Roebuck & Company ("Sears") unlawfully discriminated against him because of his age, in violation of the Kentucky Civil Rights Act, Ky. Rev. Stat. Ann. Section 344.040.[1] Based on diversity of citizenship, Sears removed this action to the United States District Court for the Eastern District of Kentucky.

On December 12, 1994, after the issue was extensively briefed by both parties, the District Court sustained Sears' Motion for Summary Judgment. In a well-reasoned and

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1. On December 29, 1993, Petitioner's Complaint was amended to include a common law claim for "wrongful discharge." The District Court held that the Petitioner's "wrongful discharge" claim failed as a matter of law. The dismissal of this claim has not been challenged subsequent to the District Court's dismissal.

thorough opinion, the District Court concluded that the Petitioner had not proved a *prima facie* case of age discrimination because he had admitted that he failed to meet Sears' sales goals and was therefore not qualified for his sales associate position. In the alternative, the District Court further concluded that even if the Petitioner could prove a *prima facie* case, he could not establish that Sears' legitimate, nondiscriminatory reason for the Petitioner's discharge was pretextual.

On appeal to the Sixth Circuit, the Petitioner *did not* contend that the District Court erred by considering the employer's subjective view of the Petitioner's performance at the *prima facie* stage of the case. Rather, the Petitioner urged that he was in fact qualified for his position and that Sears made "too big a deal" out of his failure to meet its sales goals. The Sixth Circuit appropriately rejected this argument and, citing the Petitioner's admission that he was not performing to the satisfaction of Sears' management, affirmed the District Court's ruling.

B. Correction of Misstatements in the Petition.

The opinions of the District Court and the Court of Appeals correctly and adequately set forth the facts of this case. These opinions accurately highlight the Petitioner's consistent failure to meet Sears' sales goals. In the interest of brevity, the Respondent respectfully directs the Court's attention to these opinions.

Pursuant to United States Supreme Court Rule 15.2, the Respondent brings to the Court's attention the following misstatements of fact contained in the petition.

The Petitioner incorrectly states that he "consistently" received marks of "meets expectation" or better on "all" of his performance evaluations. (Petition at 2). In fact, the Petitioner's

inability to sell maintenance agreements is well documented. On his 1993 annual sales associate evaluation, for example, the Petitioner received a "far below expectation" ranking for his maintenance agreement sales.

The Petitioner also incorrectly characterizes his performance in the appliance department as "excellent." (Petition at 2). Again, the Petitioner's performance inadequacies are amply documented. As detailed in the District Court's opinion, the Petitioner was called in for a number of "deficiency interviews" and told to increase his monthly sales of maintenance agreements. (Op. at A-4 to A-5). In addition to his 1993 evaluation, the Petitioner was given written warnings concerning his inability to sell maintenance agreements — and told that he could not continue to work in the appliance department if he did not improve — in October of 1992 and twice in March of 1993. (Op. at A-5).

Although the Petitioner contends that his total maintenance agreement sales were adequate relative to other employees, it is significant that Sears assessed an employee's performance by analyzing their "MA percentage" (the ratio of maintenance agreement sales to merchandise sales) and not by counting their gross maintenance agreement sales. In October of 1992, Petitioner received a deficiency review warning him that his MA percentage was the *lowest of any sales associate in the Home Appliance Department.* Five months later the Petitioner's MA percentage had not increased and the Petitioner received another deficiency warning noting that his MA percentage for the month of January 1993 ranked *8th out of 10 employees in the Home Appliance Department.* This deficiency warning also noted that of all of the sales associates, only the Petitioner failed to increase his MA percentage in February of 1993.

Further, in comparing his performance to other employees,

all of whom either worked in different departments and/or were part-time employees, the Petitioner fails to note that both the District Court and the Sixth Circuit ruled that these employees were not "similarly situated" and were inappropriately characterized by the Petitioner as "comparable." *See* Op. at A-10 to A-11 (Dist. Court); Op. at B-5 (Ct. of Appeals). In fact, the Sixth Circuit correctly stated that the Petitioner's comparisons were "rightfully discounted" by the District Court. (Op. at B-8).

Likewise, the Petitioner omits the fact that his replacement was previously employed on a part-time basis. As the courts below emphasized, that employee's performance statistics are simply not "comparable" to those of the Petitioner, a full-time employee. The petition does not seek review of the lower courts' findings that the Petitioner failed to identify truly comparable employees. In light of these conclusive findings, the Petitioner's attempt to re-argue this issue is wholly inappropriate. *See Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

Finally, the Petitioner contends that he produced "proof" that Sears employees were pressured into early retirement. (Petition at 3). This "proof" consists of two affidavits from former Sears employees containing personal opinions as to Sears' motivation for offering early retirement to certain employees. As the Sixth Circuit recognized, neither affiant produced any evidence that Sears discriminated against older employees and the affidavits produced by the Petitioner are not appropriately considered probative. (Op. at B-9).

REASONS FOR DENYING THE WRIT

The Respondent respectfully opposes the petition for writ of certiorari. First, the Petitioner seeks review of a question never presented to the courts below. Second, the Petitioner cites a "conflict" among the Circuit Courts of Appeals where no conflict in fact exists. Finally, the Petitioner does not contend that the Sixth Circuit improperly stated the law. At most, the Petitioner seeks a determination that the Sixth Circuit misapplied the law and improperly evaluated the evidence. The time for such an argument has long since passed and this Court should deny review.

I.

THE PETITIONER SEEKS REVIEW OF A QUESTION NEVER PASSED ON BY THE COURTS BELOW.

With very few exceptions, this Court wisely refuses to review issues neither "pressed nor passed upon below." *United States v. Williams*, 504 U.S. 36, 40 (1992). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In this Court, for the first time, the Petitioner argues that evidence regarding an employee's inadequate job performance is not properly considered as part of the *prima facie* case of age discrimination and may be considered only at the "pretext" stage by the factfinder. (Petition at i).

Yet despite the benefit of having filed three (3) memoranda in opposition to the Respondent's motion for summary judgment

in the District Court, as well as a brief in the Sixth Circuit, the Petitioner did not raise this issue until he filed his petition for a writ of certiorari. In fact, in both lower courts, the Petitioner attempted to prove a *prima facie* case by arguing that his performance evaluations and his gross maintenance agreement sales figures *established that he was qualified for his position.* Having unsuccessfully argued that these "subjective views" of his job performance conclusively *established* a *prima facie* case, the Petitioner cannot now claim that the lower courts erred by considering this evidence as part of the *prima facie* case.

While certainly not surprising in light of the Petitioner's failure to raise this issue, neither of the lower courts expressly addressed the legal question of whether performance evaluations may be considered as part of the *prima facie* case. Both the District Court and the Sixth Circuit decisions rest on findings that the Petitioner failed to prove a *prima facie* case of age discrimination under either the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973),[2] and its progeny, or the alternative test adopted by the Sixth Circuit in *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1989). Rather than arguing that the courts were misapplying the *McDonnell Douglas* test, as he contends in this Court, the Petitioner unsuccessfully argued to both lower courts that his evidence, which included "subjective performance reviews," established that he was qualified for his position and that he met all of the elements required to prove a *McDonnell Douglas prima facie* case.

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2. Although this case arises under the Kentucky Civil Rights Act, Ky. Rev. Stat. Ann. Chapter 344, courts resolve claims under the Kentucky Civil Rights Act by applying the same three-step analysis used by the Federal Courts in cases arising under Federal law. *See Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 n. 8 (6th Cir. 1994); *Harker v. Federal Land Bank of Louisville*, 679 S.W. 2d 226 (Ky. 1984).

In view of this Court's unwillingness to hear arguments on questions not raised below, the petition must be denied. This result is especially appropriate in cases, such as this one, in which the Petitioner not only fails to argue below that the courts misapplied the law, but consistently acquiesces in that "misapplication."

II.

THERE IS NOT A SPLIT OF AUTHORITY ON THE ISSUE RAISED IN THE PETITION.

It is a familiar proposition that a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. In cases such as the present one, this normally requires, at a minimum, that "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10(a).

The issue raised in the petition fails to satisfy this Court's stringent requirements for granting a writ of certiorari. Unquestionably, proof that an employee is qualified is essential to a *prima facie* case of employment discrimination under the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). An examination of the cases cited by the Petitioner reveals that courts have consistently applied *McDonnell Douglas* and any conflict on the issue of whether or not job performance is relevant to an employee's qualification is truly illusory.

In fact, contrary to the argument raised by the petition, the federal circuit courts simply have not addressed the issue raised in the petition — and the cases cited by the Petitioner do not "hold" that it is error to consider job performance at the *prima facie* stage of proof. To the extent that courts have *discussed*

the issue of whether or not an employee is "qualified" for his or her position, they have consistently and uniformly considered job performance evaluations to be relevant to a determination of the issue. Accordingly, review by this Court is unnecessary and the petition should be denied.

A. The Sixth Circuit Court of Appeals has consistently evaluated an employee's performance as part of the *prima facie* case.

The Sixth Circuit correctly determined that the Petitioner's candid admission that he was not meeting the legitimate performance standards established by the Respondent prevented him from proving that he was qualified for his position.[3] (Op. at B-4). In so holding, the Court of Appeals simply confirmed its unwavering support for the long-standing proposition that an employment discrimination plaintiff "must prove that he was performing his job 'at a level which met his employer's legitimate expectations.' " *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990), *quoting Huhn v. Koehring*, 718 F.2d 239, 243 (7th Cir. 1983).

Despite the Sixth Circuit's uniform interpretation of the "qualified" prong of the *McDonnell Douglas prima facie* case, the Petitioner attempts to create a conflict by stating that in both *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3267 (U.S. Oct. 10, 1996) (No. 96-486), and *Danielson v. City of Lorain*, 938 F.2d 681 (6th Cir. 1991), the Sixth Circuit "found" that a *prima facie* case had been proved

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3 . Without citing to the court below, the Petitioner makes the curious assertion that "the Court made a credibility-assessment of actual job performance at the *prima facie* stage of proof." (Petition at 4). It is not entirely clear whose credibility was being assessed by the Court of Appeals: the *Petitioner himself* stated that he did not perform to his employer's satisfaction. *See* Op. at B-4.

and considered job performance only at the pretext stage. (Petition at 4-5). In fact, the Court did not make such a "finding" and did not consider the question raised in the petition *in either case*. In *Hartsel*, the Sixth Circuit *refused to consider* the lower court's finding that a *prima facie* case had been proved. *Hartsel*, 87 F.3d at 800. In *Danielson*, the court *assumed arguendo* that a *prima facie* case had been proved and declined to discuss the elements of *prima facie* case. *Danielson*, 938 F.2d at 683.[4] There simply cannot be a "conflict" as to the proper application of the elements of a *prima facie* case, as the Petitioner contends, when the cases cited in the petition *do not address the elements of a prima facie case*. Unquestionably, there is no split of authority within the Sixth Circuit on the issue raised in the petition.

B. There is no conflict between the decision below and any decision of any other federal court of appeals as to the proper application of the *McDonnell Douglas prima facie* case.

The Petitioner further predicates his request for a writ of certiorari on a split of authority among the federal circuits. This Court rarely grants review unless the decision sought to be reviewed is "squarely inconsistent" with decisions of other courts of appeals on an important issue of federal law. *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984). By pointing to "holdings" that do not exist and citing "findings" that are not actually made, the Petitioner valiantly attempts to create a split of authority on the issue raised by the petition.

A review of the "conflicting" decisions cited in the petition, however, reveals that the courts of appeals simply have not addressed the issue of whether an employee's subjective

4. Interestingly, the *Danielson* court does note that a discrimination plaintiff may not be successful unless she performs her job at a level which "met the employer's legitimate expectations." *Id.* at 684, *citing Neufeld v. Searle Laboratories*, 884 F.2d 335, 339 (8th Cir. 1989).

performance evaluations are properly considered at the *prima facie* stage of proof in employment discrimination cases. Notably, many of the "conflicting" decisions actually grant summary judgment for the employer and are therefore quite consistent with the Sixth Circuit's decision in this case. Still others find for the employee, but apply the same analysis as that applied by the Sixth Circuit below. In short, the Petitioner's efforts to create a conflict prove futile, and this is yet another case in which the lower courts are in harmony and review is unwarranted.

1. The majority of the cases cited in the petition simply do not make the "holding" attributed to them by the Petitioner.

The Petitioner attributes error to the Sixth Circuit's decision[5] to consider his performance problems at the *prima facie* stage of his case. Seeking to create a conflict on this issue, the Petitioner cites to a number of cases for the proposition that most circuits have "held" that such evidence is properly considered as part of the "pretext" analysis rather than as part of the *prima facie* case. Yet none of the cases cited by the Petitioner even address the issue raised in the petition. In fact, the majority of the cases cited in the petition do not even consider the type of proof required to prove a *prima facie* case of age discrimination. How these cases can "hold" that it is error to consider job performance as part of the *prima facie* case when they do not even address the *prima facie* case is somewhat perplexing.

In *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323 (1st Cir. 1996), for example, the First Circuit refused to discuss the elements of a prima facie case, stating that "[s]ince we find

5. Of course, the Sixth Circuit never in fact made a "decision" as to this issue because it was never raised below.

the plaintiff did not meet his burden . . . of establishing pretext, we need not tarry over the prima facie case issue." *Id.* at 328. In view of its failure to address the *prima facie* case, it is apparent that the Petitioner's contention that the First Circuit "agreed" on a conflicting interpretation of the qualification element of the *prima facie* case is incorrect. (Petition at 5).

Likewise, in *E.E.O.C. v. Insurance Co. of North America*, 49 F.3d 1418 (9th Cir. 1995), the Ninth Circuit addressed whether or not an applicant was appropriately rejected as being "overqualified" for a position. Because the parties agreed that the applicant met the qualifications for the job, there was not a dispute as to whether or not he was "qualified." Indeed, the court *could not have* discussed the proper use of "subjective evaluations of job performance" in *Insurance Co. of North America* because the fact that the plaintiff had not been hired precluded any evaluation of his performance.

Other cases cited in the petition similarly fail to analyze the *prima facie* case and certainly do not make the broad "holdings" attributed to them by the Petitioner. *See Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1995) (employer concedes *prima facie* case); *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995) (court considers issue of after-acquired evidence and does not discuss requirements for *prima facie* case); *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324 (10th Cir.) (court discusses "pretext" analysis and does not analyze *prima facie* case), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 1071, 116 S. Ct. 1552 (1996); *Wohl v. Spectrum Manufacturing, Inc.*, 94 F.3d 353, 354-55 (7th Cir. 1996) (sole issue raised by the appellant is whether Spectrum's proffered reason for firing was a lie).

Further, a number of cases cited in the petition do not arise in the context of a summary judgment, but on post-trial motions

following jury verdicts. Thus, for example, the question before the Fifth Circuit in *Miller v. Butcher Distributors*, 89 F.3d 265 (5th Cir. 1996), was whether the evidence supported a jury verdict in favor of the terminated employee. The court addressed the elements of a *prima facie* case only in view of this standard of review, noting that " '[w]hen an employment discrimination case reaches the fact finder, the pertinent inquiry is whether the plaintiff has proven discrimination, *not whether he has made a prima facie case*.' " *Id.* at 267 (emphasis supplied), *quoting Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1110 (5th Cir. 1995). *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), and *Neufeld v. Searle Laboratories*, 884 F.2d 335 (8th Cir. 1989), likewise arise in the context of post-trial motions and after a discussion of the *prima facie* case becomes irrelevant.

Thus, the Petitioner's contention that these cases contain "holdings" inconsistent with those of the Sixth Circuit on the issue of whether or not job performance evaluations are properly considered as part of the *prima facie* case of age discrimination is patently wrong. Not only do these cases fail to discuss the issue raised by the petition, but, *without exception*, they fail to make any holdings at all with respect to evidence appropriately considered during the *prima facie* case.

2. Other cases cited in the petition properly consider "subjective evaluations of job performance" during the prima facie case.

Perhaps more surprising is the number of cases cited by the Petitioner in which the court *expressly considers job performance evaluations* in determining whether or not the employee has proven that he was "qualified" for his position. To the extent that these cases "rule" on the issue raised in the petition, they are completely consistent with the approach taken by the Sixth Circuit in this case.

In *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995), the Second Circuit found that the plaintiff was qualified for his position, in part, because the plaintiff received "numerous awards for excellent performance." *Id.* at 16. Certainly, the Petitioner cannot suggest that "performance awards" are anything other than a subjective measure of job performance.

Similarly, in *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995), the court determined that the plaintiff was "qualified" for his position, in part, because "[d]uring his last five years on the job, he received overall evaluations that translated into 'competent' by Quaker State's performance standards." *Id.* at 330. *See also Spulak v. K Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990) (employee was qualified because he was rated "average" or "above average" on performance reviews and received merit pay increases); *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497 (11th Cir. 1991) (employee was qualified because of his history of favorable job evaluations and positive comments by co-workers).

In fact, in addition to the cases noted above, cases in which courts properly look to an employee's performance in order to determine if the employee is "qualified" are legion. *See, e.g., Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1520-21 (11th Cir. 1990) (Sears employee not qualified for position where she failed to sell requisite amount of maintenance agreements); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990) (employee's performance problems precluded him from demonstrating that he was "qualified"); *Huhn v. Koehring Co.*, 718 F.2d 239 (7th Cir. 1983) (same); *Menard v. First Sec. Servs. Corp.*, 848 F.2d 281 (1st Cir. 1988) (same); *Spangle v. Valley Forge Sewer Authority*, 839 F.2d 171 (3rd Cir. 1988) (same). Because the approach taken by the court below does not differ from the approach consistently taken by other courts of appeals, there is no split of authority on the issue raised in the petition and this Court must deny review.

3. Many of the "conflicting" cases cited in the petition actually affirm summary judgment for the employer.

Finally, it is noteworthy that many of the cases cited for the proposition that a "clear and irreconcilable" conflict exists affirm summary judgment for the *employer*. *See Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323 (1st Cir. 1996); *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328 (8th Cir. 1995); *E.E.O.C. v. Insurance Co. of North America*, 49 F.3d 1418 (9th Cir. 1995); *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324 (10th Cir.), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 1071, 116 S. Ct. 1552 (1996); *Duart v. FMC Wyoming Corp.*, 72 F.3d 117 (10th Cir. 1995). It seems highly incredulous for the Petitioner to claim that the "holdings" in these cases "conflict" with that of the Sixth Circuit in this case when, in fact, all affirm summary judgment for the employer.

In short, none of the cases cited in the petition conflict with the Sixth Circuit's decision below. Indeed, none of the decisions even address the issue raised, for the first time, in the petition. Even assuming that these decisions impliedly address whether an employee's job performance is appropriately considered as part of the *prima facie* case, it is abundantly clear that the federal circuits do not differ on their application of the *McDonnell Douglas* test. Accordingly, this Court should deny review of the Sixth Circuit's well-founded decision.

III.

ANY CONFLICT WHICH MAY EXIST RESULTS FROM DIFFERING APPLICATIONS OF A PROPERLY STATED RULE OF LAW.

It has been this Court's practice to deny review when the federal courts properly state the law, but differ in their approach

to evaluating the evidence and facts particular to each case. Indeed, Supreme Court Rule 10 clearly provides, in part, that a petition is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Even assuming that the issue stated in the petition was raised below, and that there is a split of authority in the courts of appeals, the Petitioner does not contend that the court below misstated the law applicable to this case. Indeed, the Sixth Circuit properly set forth the three-part framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *See* Op. at B-3. At most, therefore, the error asserted by the Petitioner consists of a "misapplication" of the *McDonnell Douglas* test. (*See* Petition at 8 "The other Circuits are in conflict concerning how to consistently interpret and apply *McDonnell Douglas* and *St. Mary's*."). Unquestionably, review of this "error" is unneccesary and unwarranted.

CONCLUSION

For the foregoing reasons, this Court should deny review of the Sixth Circuit's decision.

Respectfully submitted,

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